

**BEFORE THE INDIANA
BOARD OF SPECIAL EDUCATION APPEALS**

In the Matter of T.W.)	
And)	
Fort Wayne Community Schools,)	Article 7 Hearing No. 1248.01
)	
Appeal from a Decision by)	
Thomas J. Huberty, Ph.D.,)	
Independent Hearing Officer)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDERS

Procedural History

It should be noted from the outset that any references to the “Student” or the “Student’s representative” include the parent or parents of the student. It should also be noted that Fort Wayne Community Schools will be referred to as the “School.”

On October 25, 2001, the Student filed a request for a due process hearing with the Indiana Department of Education (see 511 IAC 7-30-3). An Independent Hearing Officer (IHO) was appointed on October 25, 2001. A telephonic Prehearing conference was held on November 2, 2001. On November 15, 2001, the IHO issued an *Interim Order Regarding Related Services*, ordering that two hours of occupational therapy be provided per week until the IHO’s decision was rendered. On November 2, 2001, the parties joined in a motion to request additional time to conduct the hearing, and an order granting an extension was issued by the IHO on November 15, 2001. The date of December 21, 2001 was established for issuing the decision. The parties defined the issues for determination as follows:

1. What is the appropriate amount of speech services for the Student?
2. What is the appropriate amount of occupational therapy services for the Student?
3. Did the school violate Article 7 when it conducted an evaluation on November 14 and produced a written report?

The due process hearing was held on November 27, 2001. Exhibits presented by the Student

were admitted without objection from the School. The Student objected to the School's Exhibit R8, which was an observation report prepared by an autism consultant employed by the School. The objection was made because the School did not inform the parents that the observation was to occur. The Student alleged that the report was an evaluation and is not permitted without parental consent. The IHO ruled that he would tentatively admit the exhibit and permit the author of the report to testify.

The Written Decision of the IHO

The IHO's written decision was issued on December 18, 2001. The following background information is reproduced verbatim from the IHO's written decision.

The Student is a five-year old boy who enrolled in the School about October 10, 2001, after moving into the corporation area from the State of California. He is described as being very cooperative, social, and works well with others. In California, the Student had been determined to be eligible for special education services as a student with autism, and had attended a special education preschool program during the 2000-01 school year. He began the 2001-02 school year enrolled in a special education kindergarten program. His IEP from California included a recommendation for one hour of speech language therapy (SLT) per week. When it was determined that he would be moving to Indiana, an additional one-half hour per week was recommended to prevent regression.

A sensory integration report was completed in May, 2001, in California, at the request of the parent. The Student's fine and gross motor skills were determined to be below age level expectancy. Deficits were seen in coordination, balance, bilateral motor skills, crossing his body at midline, and motor planning. Sensory processing skills also were determined to be at a deficit level and he demonstrated a short attention span. The evaluators recommended one hour of occupational therapy each week in a clinical setting. There were no specific recommendations listed for specific skill deficits, other than "...to address fine motor delays and sensory issues, especially related to vestibular, proprioceptive, and tactile function."

The IEP from June 1, 2001 was amended and included recommendations for one hour of SLT and one hour of occupational therapy in a clinic setting. The school added one hour of occupational therapy in the classroom setting, in addition to the clinic-based therapy. A California IEP dated August 31, 2001, recommended twice the amount of occupational therapy services that were recommended at the June, 2001, case conference.

A psychologist in California completed a report dated July 17, 2001, giving the Student a diagnosis of Autistic Disorder and recommended continued special education services to minimize regression as well as speech and language therapy and

occupational therapy/sensory integration therapy.

The IHO determined twenty-four (24) Findings of Fact.

After arriving in Indiana, a case conference was convened on October 17, 2001 to develop an IEP. The Student was found eligible for services for Autism Spectrum Disorder and Communication Disorder. The parent wished to have the SLT and occupational therapy implemented as per the California IEP. Testimony indicates that School personnel informed the parent that they were not required to accept and implement an out-of-state IEP and offered one hour of SLT and one hour of occupational therapy per week. The parent did not agree with that recommendation and did not sign the IEP. She did agree to evaluation of speech and language skills, as well as an occupational therapy evaluation. During the case conference, the School indicated on an interim IEP that it would continue with the goals and objectives stated in the California IEP for speech and occupational therapy until the evaluations were completed, with one hour given each week in each area.

The evaluations were completed and a second case conference was convened on November 13, 2001. The proposed IEP includes a recommendation for placement in a special education kindergarten classroom, with which the parent agrees. The disagreement remained about how much time the Student should receive for speech and occupational therapy services. The evidence and testimony indicated that the case conference committee considered the information from California in developing the IEP. The School recommended one hour of speech therapy per week and one half hour of direct occupational therapy and one half hour integrated into the classroom. An additional fifteen minutes of occupational therapy consultation with the teaching staff was recommended. The parent rejected the occupational therapy recommendation, wanting two hours of therapy per week, with one hour of direct service and one hour in the classroom working directly with the Student. The proposed IEP contains goals and objectives that are consistent with the evaluative data provided by California and local School evaluators in the areas of speech/language and occupational therapy.

Following the second case conference, the Director of Special Education asked an autism specialist employed by the School to conduct an observation of the Student in his classroom. At the time of the request, the due process hearing had been scheduled for November 27, 2001. The observation was conducted on November 15, 2001, and a report generated dated November 16, 2001. Testimony indicated that the parent did not know that this observation was to occur and did not give consent to it in either case conference or at any other time. She was not aware of the observation and report until reviewing the exhibits for the hearing. School personnel testified that they did not inform the parent that the observation was to be conducted, believing that it was not an evaluation, but an observation that did not require parental permission. The classroom teacher testified that she assumed the observation was done in preparation for the due process hearing.

The speech/language therapist testified that she evaluated the Student after attending the October 17, 2001 case conference. She prepared a report dated November 1, 2001, which indicated that the Student's overall receptive and expressive language skills are about 2 to 2½ years below age level and auditory comprehension skills at about the 3 year, 2 month level. She indicated that the Student is using five-word sentences and phrases of increasing length, and appears to be making progress. The Student also demonstrated a short attention span of 10-15 minutes while she was working with him. She described his language skills as being higher than most other children with autism. In constructing goals and objectives for the Student's IEP, the speech therapist used some listed in the California IEP, and added others based on her evaluation. She recommended that the Student receive sixty minutes of SLT per week, currently as two 20-minute individual sessions and one 20-minute session in the classroom with other children.

The occupational therapist who evaluated the Student determined that he had delays in fine and gross motor skills, including coordination and difficulties with tasks such as holding a pencil, writing, and using scissors. Fine motor skills were assessed at the 36 month level, and gross motor skills were at the 44 month level. Gross motor difficulties included difficulties maintaining kneeling positions and problems with joint stability. She testified that the Student should receive direct therapy, as well as assistance in the classroom for thirty minutes each per week, plus fifteen minutes of consultation per week.

The IHO found that the Student's mother agreed with the speech and occupational therapy goals and objectives, but that he needed more help in the classroom with skills such as positioning himself in space, fine motor skills, and help with transition. She did not view the Student as having made as much progress as he did in California in speech and motor skills. In her view, he needs more direct instruction and that a "trained eye" is needed, rather than relying upon teachers and others to implement interventions.

Issue #3 Did the School violate Article 7 when it conducted an evaluation on November 14 and produced a written report?

The IHO found that the School's Director of Special Education asked the autism specialist to observe the Student after the second case conference was conducted. The School did not notify the parent in the case conferences or at any time that the observation was to occur and did not obtain parental consent. Student's counsel referred to an Indiana Department of Education complaint investigation No. 622.91, which addressed the issue of evaluations by a specialist. The IHO took official notice of having reviewed this investigation report, pursuant

to IC 4-21.5-3-26(f). The School argued that the observation and subsequent report was not an evaluation, and did not require notice to or consent of the parent. The IHO found that pursuant to 511 IAC 7-25-4(d), “current observations” and “classroom-based assessments” are considered part of an initial educational evaluation. A comprehensive educational evaluation “...shall include a variety of assessments and information gathering procedures designed to provide relevant functional and developmental information in all areas that may be related to the suspected disability...” 511 IAC 7-25-3(i), 34 CFR §300.532. The School was found to be in violation of informed consent requirements as to notification of evaluative procedures and providing written permission for the evaluation pursuant to 511 IAC 7-17-18, 511 IAC 7-25-4(a)(3), 511 IAC 7-25-4(b), 34 CFR §300.500(b)(1), and 34 CFR §300.505(a). The testimony of the autism specialist and his written report (Exhibit R8) were stricken from the record and were not considered in the IHO’s decision. The specialist’s testimony about matters not specifically pertinent to the Student were not stricken and were considered in the IHO’s decision.

Issue #1: What is the appropriate amount of [speech] therapy services for the Student?

The IHO found that the California IEP recommended one hour of speech language therapy, plus one-half hour to minimize regression. The evidence indicated that the Student has made progress and there is no regression. The School recommended one hour of speech therapy a week, to be divided between direct therapy and classroom integration, subject to change by the speech therapist as deemed appropriate. The IHO found that the evidence and testimony support the Conclusion of Law that one hour a week of speech therapy is appropriate. 511 IAC 7-27-9.

Issue #2: What is the appropriate amount of occupational therapy services for the Student?

The IHO found that both California and Indiana do not support either two hours or one hour, and the fact that the School is not required to accept an out-of-state IEP does not negate the requirement to provide the Student with an appropriate level of service. The IHO also found that there was not convincing evidence that the School’s in-class occupational therapy services were specifically tailored to the Student’s needs. The IHO concluded that the Student has significant delays in fine and gross motor skills, and testimony indicated that both direct and

classroom integration therapy was needed. The IHO also concluded that one and one-half hours of occupational therapy a week plus consultation are appropriate.

Appeal To The Board Of Special Education Appeals

Petition for Review

School filed on January 22, 2002, a Petition for Review with the Indiana Board of Special Education Appeals (BSEA). The Petition for Review includes the following information reproduced verbatim.

. . .The specific reasons for the exceptions to the independent hearing officer's decision and portions of the findings, conclusions, and orders to which exception are taken include:

1. Conclusion of Law ¶3 entitled: "Issue 3": Did the school violate Article 7 when it conducted an evaluation on November 14 and produced a written report" as contrary to law and unsupported by substantial evidence.
2. Conclusion of Law¶5 entitled "Issue 2: What is the appropriate amount of occupational therapy services for the student" as unsupported by substantial evidence.
3. Order ¶2 as unsupported by substantial evidence. . .

The School takes exception to Conclusion of Law #3 which states, in part, that the School was "in violation of informed consent requirements as to notification of evaluative procedures and providing written permission for the evaluation..." as contrary to law and unsupported by substantial evidence.

The School claims that Conclusion of Law #5 and accompanying Order #2 are clearly unsupported by substantial evidence. The School requests that the BSEA: (1) find that the School is not in violation of the informed consent requirements; and (2) review the recommendation for occupational therapy services and find that the recommended services contained in the IEP of November 13, 2001 is appropriate.

The Response to the Petition for Review

The Student filed on January 29, 2002, a Response to the Petition for Review. With regards to Conclusion of Law #3, the Student asserts that: (1) the School omitted that portion of the definition of "evaluation" which states, "in accordance with 511 IAC 7-25-3 through 511 IAC 7-25-7;" and these statutory provisions are incorporated into the current statutory definition of

“evaluation,” and do not limit an evaluation to something conducted for the sole purpose of a case conference committee as suggested by the School. The Student asserts that 511 IAC 7-25-3(a) specifically states:

This rule applies only to evaluation procedures for an individual student to determine the existence, nature, and extent of a disability, if any, and the special education and related services the student may need. These procedures do not apply to basic tests administered to, or procedures used with, all students in a building, grade, or class, or those required by state law.

The Student claims that the School’s autism specialist “did [not] merely observe” the Student, but “made a written evaluation report for the specific purpose of defending against the parent’s claims.” The Student further claims that the IHO’s decision is consistent with current law and well supported by substantial evidence, and requests the BSEA uphold the decision of the IHO.

Review by the Indiana Board of Special Education Appeals

The BSEA, pursuant to 511 IAC 7-30-4(j), decided to review this matter without oral argument and without the presence of the parties. All parties were so notified by “Notice of Review Without Oral Argument,” dated February 5, 2002. Review was set for February 15, 2002, in Indianapolis, in the offices of the Indiana Department of Education.

All three members of the BSEA appeared on that date. After review of the record as a whole and in consideration of the Petition for Review, and the Response thereto, the BSEA makes the following determinations.

COMBINED FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The BSEA has jurisdiction in the matter pursuant to 511 IAC 7-30-4(j).
2. The BSEA accepts Conclusion of Law #3 entitled Issue #3 as written by the hearing officer.
3. The BSEA accepts Conclusion of Law #5 entitled Issue #2 as written by the hearing officer.

ORDERS

In consideration of the forgoing, the Board of Special Education Appeals now issues the following Orders:

1. The BSEA accepts the IHO's Order #2 as written.
2. Any other motions not addressed specifically in this opinion are hereby deemed to be overruled or denied.

Date: February 18, 2002

/s/Cynthia Dewes
Cynthia Dewes, Chair
Board of Special Education Appeals

APPEAL STATEMENT

Any party aggrieved by the decision of the Board of Special Education Appeals has thirty (30) calendar days from the receipt of this written decision to request judicial review in a civil court with jurisdiction, as provided by I.C. 4-21.5-5-5.